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IN THE

Supreme Court of the United States

MARIO MORENO IVANOVA, individually and as Executor of THE ESTATE OF MARIO MORENO REYES,

Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

TIMOTHY C. RILEY
LAW OFFICE OF TIMOTHY C. RILEY
414 South Marengo Avenue
Pasadena, CA 91101

WILLIAM F. PATRY
Counsel of Record
THELEN REID & PRIEST
875 Third Avenue
New York, NY 10022
(212) 603-2068

Counsel for Petitioner

195300

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Petitioner respectfully moves the Court for an order (1) vacating the denial of the petition for writ of certiorari entered on June 13, 2005 and (2) granting the petition.

SUMMARY OF GROUNDS FOR THE PETITION FOR REHEARING

On April 11, 2005, Petitioner, filed a petition for writ of certiorari seeking review of the November 5, 2004 ruling of the United States Court of Appeal for the Ninth Circuit dismissing its appeal on the basis of the fugitive disentitlement doctrine. This dismissal was premised upon an arrest warrant that was issued by the district court when Petitioner distributed the films *El Patrullero 777* and *El Berrendero* in Mexico in violation of an injunction that ostensibly prohibited that extraterritorial conduct. At the time of the arrest warrant, the Petitioner's appeal from the district court's rulings had been pending for 1 year. The appeal raised numerous issues including lack of subject matter jurisdiction. Before the Ninth Circuit could consider the motion to dismiss, it had to first determine that the district had subject matter jurisdiction over the underlying action brought against Petitioner. The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

The Ninth Circuit found that the district court had subject matter jurisdiction under 17 U.S.C. § 104A (the copyright restoration statute) and 17 U.S.C. § 1338(a). *Pet. App. 7a.*[1] This was plain error of the type that "seriously affect the

1. The references to "*Pet. App.*" are to the appendix of the initial April 11, 2005 Petition filed herein. The other references to documents are either to the Appellant's Excerpts of Record before the Ninth Circuit or to the records in the docket of the district court.

fairness, integrity and public reputation" of the proceedings and which can be corrected by this Court at any stage in the proceeding under Supreme Court Rule 24.1(a). *See Silber v. United States*, 370 U.S. 717 (1962).[2] Columbia never alleged Copyright Act jurisdiction in its April 28, 1997 Counterclaim, the matter that went to trial. *See April 28, 1997 Counterclaim, Ninth Circuit Excerpt of Record 75*. Likewise, the original complaint as to which Columbia counterclaimed did not allege Copyright Act jurisdiction. *See April 22, 1997 Complaint of Eduardo Laparade, Ninth Circuit Excerpt of Record 74*. Moreover, in a key post-trial order the district court expressly ruled that the matter before him was a contract action and *not* a matter arising under the Copyright Act. As a consequence, the district court expressly ruled that he had not and would not rule on ownership of restored U.S. Copyrights under 17 U.S.C. § 104A. *See October 29, 2002 Order re Third Phase of Trial, Ninth Circuit Excerpt of Record 116.* As the district court expressly stated in that post-trial order: "The decision is an interpretation of the contracts as to what rights they attempt to grant, it does not in any way attempt to interpret the copyright act."

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2. The Ninth Circuit also found that the district court had personal jurisdiction because the Reyes Estate actively participated in the trial. *Pet. App. 7a.* The Reyes Estate raised lack of subject matter and personal jurisdiction in pre-answer motions to dismiss brought in the trial court on April 4, 1997, April 25, 1997, June 3, 1997, June 16, 1997 and June 18, 1997. The motions were held in abeyance while the district court action was stayed in deference to certain Mexican proceedings involving copyright ownership of the Mexican films at issue. *See August 29, 1997 Order Staying Proceedings Pending Final Disposition of Courts of Mexico, Ninth Circuit Excerpt of Record 78* . When that stay was lifted, the Reyes Estate brought another pre-answer motion to dismiss on grounds of lack of personal and subject matter jurisdiction on February 4, 2000. *See Motion to Dismiss, Ninth Circuit Excerpt of Record 126.* The district court denied the motion and ordered that the Reyes Estate to answer. The Reyes Estate answered on May 1, 2000 asserting lack of personal jurisdiction as an affirmative defense. *See Answer of Reyes Estate, District Court Docket No. 216.*

Under Rule 24.1(a), this Court may correct plain error such as that presented herein even if the issue was not addressed in the initial petition for certiorari. This Court limits its power to notice such plain error to situations where the error "seriously affects the fairness, integrity or public perception" of the proceedings. *United States v. Atkinson*, 297 U.S. 157, 160 (1936). The Ninth Circuit incorrectly grounded subject matter jurisdiction upon a basis that was not alleged by Columbia and expressly rejected by the district court. Under Supreme Court Rule 10, compelling reasons may be found to grant certiorari where a court of appeal "has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Petitioner respectfully requests that the Court vacate its order denying the petition for writ of certiorari entered on June 13, 2005 and that it summarily reverse the plainly incorrect finding of the Ninth Circuit that the district court had subject matter of the contract action in question under 17 U.S.C. § 1338(a).

HISTORY OF PROCEEDINGS RELEVANT TO THIS PETITION

A. The Death of Cantinflas and the First Series of Lawsuits

This case involves 34 Mexican films produced by and starring the late Mario Moreno Reyes, better known as "Cantinflas." Columbia was the long-time distributor of the 34 films. After the death of Reyes, a nephew who had been excluded from the will, Eduardo Laparade, came forward with a purported death bed grant whereby Reyes allegedly transferred the copyrights to the films to him. Laparade filed a lawsuit in Mexico seeking a declaration that he rather than the Reyes Estate was "the sole and legitimate owner and

holder of copyrights" to the films." *See Laparade v. Mario Moreno Reyes Su Sucesion, Case No. 415/93A, Ninth Circuit Excerpt of Record 67-68.*

At the same time, Columbia brought a 1993 Interpleader action seeking direction regarding payment of the producer's share of the proceeds from its distribution. The Reyes Estate was never served but it made a voluntary appearance to execute a settlement agreement that permitted Columbia to distribute the 34 films during the pendency of the Mexican lawsuit. The Reyes Estate made this appearance only after the other parties explicitly agreed and stipulated that its appearance could not be used as the jurisdictional basis for any further lawsuits in the United States. The settlement agreement – including the jurisdictional bar – was entered as a Stipulated Judgment by the district court in the 1993 Interpleader action. *See 1994 Stipulated Judgment, Case No. CV-93-4969 WJR, Ninth Circuit Excerpt of Record 70.*

The settlement agreement permitted Columbia to distribute the films to the extent that it had rights under the historical distribution contracts. *See 1994 Stipulated Judgment, Par. A and Par. 3.*

B. The Reyes Estate Prevails in the Mexican Litigation and the Case at Bar is Filed

In a case that went to the highest Mexican civil appellate court, the Reyes Estate prevailed in the Mexican ownership litigation and it was declared the owner of the copyrights to the 34 films.[3] Thereafter Laparade brought the present action in the Central District of California against the Reyes Estate

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3. *See June 20, 1996 Opinion of Mexico's First Circuit Tribunal, Ninth Circuit Excerpts of Record 71-73* and *Order of Judge Eighteen of Mexico City Federal District, Case No. 135/97 B, Ninth Circuit Excerpts of Record 79-80.*

and Columbia seeking a declaration from that he was the sole owner of the 34 films. As a counterclaim, Columbia brought the action that would go to trial in the district court. In that case Columbia sought a declaration at trial that it was the owner under United States common law of all worldwide rights in 26 of the pictures. As to the other 8 Pictures, Columbia admitted before trial that its limited distribution rights had expired and it sought a declaration that before the Reyes Estate could exploit those films, it owed Columbia a right of first refusal.

The Reyes Estate sought dismissal of both actions on jurisdictional grounds.[4] The district court dismissed the Laparade action but it permitted Columbia's 1997 action to go forward based upon its finding that "it appears that the [1994] Stipulated Judgment was at least arguably premised upon the notion that Columbia owned the rights to the subject films." *Pet. App. 70a.* The 1994 Stipulated Judgment did not once use the words "own" or "ownership" and, once again, it stated in the first paragraph that it could not as the jurisdictional basis for any further lawsuits.[5]

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4. As addressed above, the Reyes Estate raised lack of subject matter and personal jurisdiction in pre-answer motions to dismiss brought in the trial court on April 4, 1997, April 25, 1997, June 3, 1997, June 16, 1997 and June 18, 1997. The motions were held in abeyance while the district court action was stayed in deference to certain Mexican proceedings involving copyright ownership of the Mexican films at issue. *See August 29, 1997 Order Staying Proceedings Pending Final Disposition of Courts of Mexico, Ninth Circuit Excerpt of Record 78.* When that stay was lifted, the Reyes Estate brought another pre-answer motion to dismiss on grounds of lack of personal and subject matter jurisdiction on February 4, 2000. *See February 4, 2000 Motion to Dismiss, Ninth Circuit Excerpt of Record 126.*

5. Paragraph 2 of the Stipulated Judgment provided:

> Mario Moreno Ivanova . . . hereby appear[s] specially and solely for the limited purpose of giving jurisdiction to this Court to enter judgment pursuant to the terms of this

(Cont'd)

Against the jurisdictional challenges of the Reyes Estate, the Columbia counterclaim went to trial from February 26 to March 19, 2002. Underlying the cases was the undisputed fact that most of the films were in the public domain in the United States and copyrights were restored to the "author" or "initial rightholder" as determined by Mexican law. 17 U.S.C. § 104A. Because of this, Columbia never alleged Copyright Act jurisdiction and it never sought a declaration of copyright ownership. It instead sought a declaration that it owned worldwide rights in 26 of the films under U.S. common law contract principles.

Following a bench trial conducted over the objection of the Reyes Estate, the district court ruled that Columbia was the owner of all "Film Rights" in 26 of the pictures. *Pet. App. 24(a) and 25(a).* In post-trial briefing, Columbia asked the district court not to rule on it claim of first refusal rights in the remaining 8 pictures but instead to rule that the Reyes Estate – the defendant – had no rights in those films. The district court did this and it enjoined the Reyes Estate's distribution of the 8 pictures on the basis that the Estate "has not established any right to distribute the 8 Motion Pictures." *Pet. App. 26(a).*

C. The District Court Clarifies that It Was Not Acting Under Copyright Act Jurisdiction

Following the trial, Columbia requested that the district court rule that it implicitly found that Columbia was the owner

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(Cont'd)

> stipulation ("the Judgment") and for the enforcement of this stipulation and the Judgment. The parties covenant and agree individually and by their respective attorneys that this special appearance shall not be deemed consent to general jurisdiction by [the Reyes Estate] in this action or any other action, nor a waiver of [the Reyes Estate's] claim of lack of jurisdiction with regard to any other action or proceeding already on file, or which may be filed, in the State of California.

of the restored U.S. Copyrights in the films under 17 U.S.C. § 104A when it ruled that Columbia owned the "Film Rights" in the 26 films. In a key October 29, 2002 Order, the district ruled that Columbia's case was a contract action and that he had not ruled on ownership of the restored copyrights implicitly or otherwise. *See October 29, 2002 Order re Third Phase of Trial, Ninth Circuit Excerpt of Record 116.* The district court stated therein:

> The Court does not rule "implicitly." The Court made no findings with respect to copyright in the second phase... The decision is an interpretation of the contracts as to what rights they attempt to grant, it does not in any way attempt to interpret the copyright act. Furthermore, the Court made clear that (U.S. copyright) restoration issues were not tried in its tentative ruling on [the Reyes Estate] Motion for New Trial . . . Columbia's argument which has been accepted by the Court is that all of the dispute can be resolved by an interpretation of the contract. In *Franklin v. Cannon Films, Inc.*, 654 F. Supp. 133 (C.D. CA 1987), this district held that it does not have jurisdiction over an action merely because it involves in some way a copyright or simply because a copyright is the subject of a contract.

In late 2002, the Reyes Estate licensed the films *El Patrullero 777* and *El Berrendero* for DVD release in Mexico. These were 2 of the 8 films as to which Columbia's limited distribution rights had expired. Again, the only claim that Columbia pursued in regard to these films was a claim that the Reyes Estate owed it a right of first refusal – a claim which the district court never ruled upon. The Reyes Estate licensed these films in Mexico to raise $20,000 that was needed for an emergency surgery for one of the grandsons of

Mario Moreno Reyes. *March 19, 2003 Declaration of Mario Moreno Ivanova, Ninth Circuit Excerpt of Record 187.*

D. The District Court Issues an Arrest Warrant When the Estate Challenges Its Subject Matter Jurisdiction

Even though Columbia had effectively abandoned its claims to distribution rights to *El Patrullero 777* and *El Berrendero*, it asked the district court to hold the Reyes Estate in contempt for this Mexican licensing activity. The district court held the Reyes Estate finding that "the absence of prejudice to Columbia does not excuse [the Estate's] failure to comply with this Court's order." *April 11, 2003 Contempt Order, Ninth Circuit Excerpt of Record 188, p. 5.* As a contempt sanction the district court ordered that all film elements for the 34 films be turned over to the court. *Id., p. 6.* The district court also imposed an escalating fine of $340 per day – doubling each week – until the Reyes Estate complied with its order. *April 28, 2003 Contempt Order, Ninth Circuit Excerpt of Record 191, p. 6.* Those fines are now in excess of $10,000,000.

Relying upon clear Ninth Circuit authority, the Reyes Estate informed the district court that the injunction regarding the 8 pictures was issued without any colorable jurisdiction and that it was entitled to violate the injunction while it sought review of the flimsy jurisdictional underpinnings. *See in re Hern Ironworks*, 881 F.2d 722, 726-27 (9th Cir. 1989) ([if the issuing court lacks subject-matter jurisdiction over the underlying controversy "its order may be violated with impunity . . . in such a case, the original order is deemed a nullity, and the accused contemnor cannot be fairly punished for violating nothing at all."]

When the Reyes Estate continued to stand on its rights under *Hern Ironworks*, the district court issued an arrest

warrant for the purpose of "provid[ing] the Ninth Circuit with grounds to dismiss [the Estate's] now-pending appeal in this action" under the fugitive disentitlement doctrine. *June 26, 2003 Contempt Order, Ninth Circuit Excerpt of Record 195, p. 9.*

Columbia thereafter brought a motion to dismiss the appeal of the Reyes Estate based upon the fugitive disentitlement doctrine. As addressed earlier, the Ninth Circuit first reviewed personal and subject matter jurisdiction. The Ninth Circuit found that the district court had personal jurisdiction because the Reyes Estate voluntarily participated in the trial. It also found that the district court had subject matter jurisdiction over Columbia's contract common law contract claims pursuant to 17 U.S.C. § 104A (the copyright restoration statute) and 17 U.S.C. § 1338(a). *Pet. App. 7a.*

REASONS FOR GRANTING THE PETITION

Before the Ninth Circuit could even consider Columbia's motion to dismiss it had to first make a rigorous inquiry regarding subject matter jurisdiction. If subject matter jurisdiction was lacking, the only power that the Ninth Circuit had was to announce that fact and dismiss the cause. As this Court explained in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998):

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869). "On every writ of error or appeal, the first and fundamental question is that

> of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones*, *supra*, 177 U.S. 449 at 453. The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884).

Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Again, the Ninth Circuit recognized this duty and attempted to discharge the duty by finding that the district court had jurisdiction over Columbia's cause under the Copyright Act. As addressed herein this was a jurisdictional basis never alleged by Columbia. Moreover, the district court ruled *explicitly* that the matter before it was a contract action that did not arise under the Copyright Act. It is difficult to imagine a more palpable case of "clear error."

CONCLUSION

Petitioner respectfully requests that this Court vacate its order denying the petition for writ of certiorari entered on June 13, 2005 and that it summarily reverse the plainly incorrect finding of the Ninth Circuit that the district court had subject matter of the contract action in question under 17 U.S.C. § 1338(a). The Ninth Circuit should be required to articulate a basis for subject matter jurisdiction that the district court itself did not explicitly reject.

Respectfully submitted,

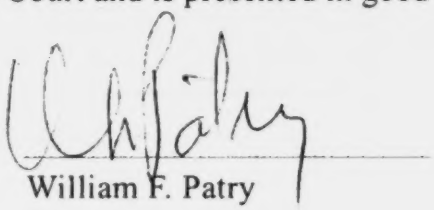
TIMOTHY C. RILEY
LAW OFFICE OF TIMOTHY C. RILEY
414 South Marengo Avenue
Pasadena, CA 91101

WILLIAM F. PATRY
Counsel of Record
THELEN REID & PRIEST
875 Third Avenue
New York, NY 10022
(212) 603-2068

Counsel for Petitioner

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



William F. Patry